No. 86-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARNOLD L. VIA,

Petitioner

v.

DONALD E. WILLIAMS, Commissioner

and

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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STATEMENT OF THE CASE

Respondents submit the following as a supplement to Petitioner's statement of the case:

1. The "Communiplate" program dates from 1981, when Commissioner Williams approved the use of six alpha characters on "personalized or "reserved" or "vanity" license plates. The authority to issue such plates dates from 1972, with the enactment of Va. Code § 46.1-105.2(a), which delegates to the Commissioner of the Department of Motor Vehicles, ("DMV") complete discretion as to whether to implement such a program. From 1972 to 1981 the DMV Commissioner permitted the use of only three alpha characters plus three numbers on each reserved license plate, so that the combination of words available was quite limited. Nevertheless, even at that time, Respondents had established a policy to disallow the use of certain combination of letters, and had included among those combinations the word "GOD."

2. The "Communiplate" program is a revenue-producing activity for the Commonwealth of Virginia. That is why it exists in Virginia and why similar programs exist in other states, and that is why it is "aggressively marketed" by Respondents. (Petitioner's Appendix A4)

3. Respondents have admitted that there are no formal regulations governing the issuance of "Communiplates", but there is no requirement that formal regulations be in place in this situation. The trial court found as a matter of fact that a policy had been established to prevent the display of religions or deities on license plates and that Petitioner had not been singled out for special treatment under that policy because of his religious beliefs. (Pet. App. A4, A6, A12.)

4. Virginia license plates, by statute, remain the property of the State (Va. Code § 46.1-102.)

5. The Commissioner of DMV, by statute, has absolute discretion as to whether or not there shall be a reserved license plate in Virginia, and how it shall be implemented. (Va. Code § 46.1-105.2.)

SUMMARY OF ARGUMENT

I. There is no substantial federal question involved in this case. The Constitutional provisions allegedly violated are substantial, of course, but the lack of other reported cases dealing with personalized license plates indicates that this is not a burning issue crying out for resolution by the highest Court in the land. The interest of an individual in the use of the six characters on a motor vehicle license plate simply does not rise to the same level of importance that the right to demonstrate or meet and debate in public areas has been accorded in our Constitutional system.

II. An automobile license plate is not a public forum. An automobile license plate might be classified as an "unusual

forum" but it should not be classified as a public forum for purposes of First Amendment analysis. Rather it should be considered nonpublic in nature and therefore amenable to reasonable restrictions established by the state, including restrictions which are based on message content. A holding by this Court that license plates are a public forum would create insurmountable difficulties in the administration of personalized license plate programs everywhere. That fact alone is a strong indication that DMV had no intention of creating a public forum when it instituted the "Communiplate" program.

III. There has been no violation of Petitioner's freedom of expression. There is no violation of an individual's freedom of expression in establishing reasonable restrictions on the use of state-owned property that is not a public forum. Moreover, even if license plates were to be considered a public forum, the policy established by DMV to exclude references to deities and religions on license plates serves a compelling state interest and is narrowly tailored to accomplish that end, so that it passes constitutional muster even under a strict scrutiny test.

IV. There has been no violation of Petitioner's rights under the First and Fourteenth Amendments. The "void-for-vagueness" argument raised by Petitioner in the third section of his argument is a doctrine which relates to criminal statutes which fail to warn individuals of what conduct is proscribed and punishable. That doctrine applies to criminal cases. It does not apply to restrictions on the issuance of personalized license plates. Accordingly, Petitioner's argument in this regard appears to be inapposite. Also inapposite is Petitioner's assertion that it is a violation of constitutionally protected rights to have a policy making revocation of a personalized license plate dependent on a single complaint. That argument is inapposite because there is no such policy.

REASONS FOR DENYING THE WRIT

ARGUMENT

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED IN THIS CASE

It might be said that this case involves what the dissenting Justices in *Perry Ed. Assn. v. Perry Local Ed. Assn.* 406 U.S. 37, 60 (1983) called an "unusual forum." In that dissenting opinion it was pointed out that:

> "this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in *Greer v. Spock*, 424 U.S. 828 (1976), and in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). All three cases involved an *unusual forum*, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum." (Emphasis added.)

The Respondents submit that a motor vehicle license plate is an unusual forum if ever there was one. Quite arguably a license plate is not a forum at all, public or nonpublic. It contains space for only six characters; room, perhaps, for one or two short words. The plate at issue in this case, "ATH-EST," does not even spell the intended word, "atheist," because of the six character limitation. There is nothing on the plates but the name of the state, the date of expiration, and the six (or fewer) characters. The six characters are chosen at random from an available pool by DMV personnel, unless the vehicle registrant requests a "Communiplate" and pays the extra ten dollar (annual) fee.

A request for a "Communiplate" will be honored, provided the combination of characters requested is available. If the combination requested has been issued earlier to someone else, it is not available (the plates are part of the state's registration and identification system, so that each plate must be unique). If the combination is among those which the DMV will not issue under the policy established to preclude the issuance of plates which are lewd, vulgar, obscene, or which make reference to drug culture, deities, or religions, it will also be considered not available.

A forum which permits the use of only six characters (and then only if someone else has not already chosen the same combination of characters) is extremely limited and very unusual to say the least. Such a forum is a far cry from public streets, sidewalks and parks. It is a far cry, too, from university meeting rooms where students "participate in the intellectual give and take of campus debate" (*Widmar v. Vincent*, 454 U.S. 263, 267-268, N.5 (1981)), or a school mail system where messages can be exchanged (*Perry Ed. Assn. v. Perry Local Ed. Assn.*, supra), or even a solicitation for a charity drive which is limited to 30 words (*Cornelius v. NAACP Legal Def. & Educ. Fund*, _____ U.S. _____, 105 S. Ct. 3439 (1985). There is no debate, no "give or take," no exchange of ideas possible on a license plate. There is no room for the kind of intereplay of ideas and public debate that the First Amendment was designed to protect.

Respondents are in no way precluding Petitioner from expressing his views by depriving him of a particular license plate. He can and does express those views on bumper stickers and signs on his automobile. The metal or plastic holder for his license plate is available for his use. He may express himself as he wishes anywhere on his motor vehicle, except for the one part of that vehicle which belongs to the state, and which is clearly identified with the state, the license plate.

The impact on an individual's freedom of expression caused by limiting his unfettered use of the six characters on a license plate is miniscule. The alternative methods for expression are virtually unlimited, even within the confines of Petitioner's automobile and certainly elsewhere, and are far superior in terms of expressing concepts and exchanging ideas completely and directly.

Respondents submit that the history of litigation on the subject of personalized license plates indicates that most persons do not consider the use of license plates for expressive purposes as a significant issue. Respondents have found but one reported case dealing with personalized license plates. *Katz v. Department of Motor Vehicles*, 32 Cal. App. 3d. 679, 108 Cal. Rptr. 424 (1973). Personalized license plates have been around since the 1930's, and states have consistently limited the subject matter to be permitted on those plates. The fact that there has been only one reported case determining a state's authority to control the content of such plates in all that time,and that that one case is now fourteen years old, seems to indicate that individuals do not consider license plates critical to their ability to express themselves.

Jurisdiction to review a case by writ of certiorari under 28 U.S.C. § 1257(3) is predicated on the existence of a substantial federal question. *Zucht v. King*, 260 U.S. 174 (1922). Although the precise parameters of that standard are not clear, Respondents submit that the issue of an individual's right to a particular license plate to identify his vehicle under a state's motor vehicle registration laws does not rise to the level of a burning federal question demanding resolution by the highest Court of the land. There is no conflict among the Federal Circuits or among the states on this issue. The *Katz* case apparently is the only reported case, ever, on this issue. There have been no cases in federal court whatever. It appears that there has been no real interest in this issue. Petitioner has urged that a decision in this case could serve to limit future litigation on this

question. (Pet. 12,23.) Respondents submit that there has been no such litigation in the past and there is no indication that there will be any in the future.

Petitioner apparently is quite sincere in his belief that he should be allowed the license plate of his choice. Respondences applaud his willingness to pursue his beliefs. Nevertheless, it appears from the history of litigation in this area that no one else has considered a license plate to be a particularly important forum for expression. Respondents submit that any federal question involved in this case is not of such significance as to warrant a grant of certiorari.

II

A PERSONALIZED AUTOMOBILE LICENSE PLATE IS NOT A PUBLIC FORUM

Petitioner contends that Respondents have somehow converted vehicle license plates, which are nothing more than physical evidence of vehicle registration and identification, to a public forum. He contends that Respondents have shown their intent to create a public forum by marketing the license plates to members of the public as a means of expressing themselves.

Respondents submit that "Communiplates" are marketed to the public as a means of producing revenue for the state. License plates must be issued for every vehicle in any event, in order to identify the vehicle and indicate that it has been registered. Traditionally the license plates were marked with letters and numbers with no meaning outside of the registration/identification scheme, and there was no question that a state had complete discretion to control the letters and numbers that were used in such a system. When it became apparent that some individuals were willing to pay extra to have plates with certain combinations of letters, "personalized" or 'vanity" license plate as they are often called, the states discovered that with only slight alterations in their registration/identification systems they could tap a new revenue source.

The states were happy to alter their registration systems slightly to allow individuals some choice in the content of their license plates. Nevertheless, the plates remain a part of the registration system. Only one license plate containing a particular combination of characters can be issued by a state no matter how many people may want that combination. There can be no right to a particular combination of letters, since the combination might already be taken.

The reason for issuing personalized plates, and the reason that such plates are advertised, is to raise revenue. There was never an intention on the part of Respondents to create a public forum in a constitutional sense by advertising and marketing personalized license plates, any more than a store which advertises a product for sale intends thereby to make its premises a public forum, or any more than the transit company in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), intended to create a public forum by accepting commercial advertising.

Petitioner cites *Widmar v. Vincent*, 454 U.S. 263, 267, for the proposition that the government may "create a public forum for the expression of ideas by intentionally opening a non-traditional forum for public discourse." (Pet. 8.) Respondents submit that *Widmar* does not stand for the proposition for which Petitioner cites it. *Widmar* involved the use by students of meeting rooms at a state university. The footnote on the page cited by Petitioner clearly points out that public universities have *traditionally* been considered a public forum, at least for students, calling such universities "the marketplace of ideas." 454 U.S. at 267, N.5. In any event, the forum involved in the *Widmar* case is clearly different in kind from the forum in this case. It is difficult to see how the six letters on a vehicle license plate could be considered remotely similar to a "marketplace of ideas". The First Amendment was clearly designed to protect and promote debate and the exchange of ideas. Meeting rooms are places where debate and exchanges can take place. License plates simply are not.

The cases cited by Petitioner, including *Widmar; Perry Educ. Assn. v. Perry Local Educ. Assn.*, supra; *United States v. Grace*, 461 U.S. 171 (1983); and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), do discuss the distinction between a public and a nonpublic forum for purposes of First Amendment analysis. As Petitioner points out, such cases have looked to such factors as the policy and practice of the government with regard to the property, the nature of the property, and its compatibility with expressive activity to discern whether a public forum (or limited public forum) or nonpublic forum is involved. (Pet. 8.) Respondents submit that consideration of those factors in this case indicates that a license plate should be considered a nonpublic forum.

A license plate most certainly cannot be considered a traditional public forum as that term has been used by this Court. Respondents submit that license plates also should not be considered a limited public forum, in spite of any marketing effort by DMV to encourage individuals to purchase such plates. Such marketing was done with the intent of raising revenues. There was no intent to create a public forum in a First Amendment sense.

Respondents submit that the nature of a license plate and its incompatibility with expressive activity also indicate that a license plate should be considered a nonpublic forum. In fact, license plates probably should not be considered a forum at all in light of such factors. The confines of six characters for expressing ideas is extremely limited. The ability to exchange ideas, to debate, to engage in the give and take of communication that the First Amendment was designed to protect is non-existent. At most a personalized license plate might be considered comparable to a small placard expressing a single word thought, and while a placard might well be something one would carry in a public forum, it is not itself a public forum.

Moreover, the requirement that the six characters chosen fit into the state's registration system means that, even at best,applicant is not free to choose what he wants to say

because someone else may have chosen to say it already. With nearly 400,000 "Communiplates" already issued, many of the combinations that an individual might want to use have been spoken for.

The result of a holding that a personalized license plate is a public forum may well be that such license plates would no longer be issued. There appears to be no middle ground: if the plates are a public forum then presumably the states cannot control the content of such plates unless they are obscene. Given decisions of this Court such as the holding in *Cohen v. California*, 403 U.S. 15 (1971), that the word "FUCK" is not obscene, it is difficult to imagine any combination of six characters that could possibly be considered obscene. It would appear, therefore, that states could exercise no control whatever over license plates if they are considered a public forum.

Even Petitioner, through his counsel, has admitted that the states have an interest in excluding certain words from license plates. Petitioner's counsel had trouble articulating a standard which would pass constitutional muster, however, stating at one point that perhaps words that are "totally gross" could be controlled, and stating that "it is a totally gray area". (Tr. 32,37.) Respondents agree that it is a gray area. Line drawing as to what should and should not be allowed on a license plate is difficult. Nevertheless, Respondents submit that no state will willingly issue a license plate with the word "FUCK" on it, and that they should not be required to do so by a ruling from this Court that license plates are a public forum.

Respondents acknowledge that difficulties in establishing where to draw the line on license plates cannot stand in the way of First Amendment freedoms, but Respondents submit that such difficulties are more than just an excuse for Respondents' position in this case. They are part and parcel of the nature of license plates and the states' concerns and practices with regard to those plates, factors which this Court has looked to in determining whether the

government intended its property to become a public forum.

The states do have an interest in controlling what appears on the license plates they issue. *See, Katz v. Department of Motor Vehicles*, supra. Petitioner has admitted as much. Whether that interest amounts to a compelling state interest is another matter. If it does, then Respondents submit that Petitioner has lost his case. If it does not, and if license plates are to be considered a public forum, then the states will be placed in an untenable position from which the only recourse will likely be to abolish personalized license plates. Again, Respondents submit that this is a further indication that the states had no intention of creating a public forum by offering personalized plates.

III

THERE HAS BEEN NO VIOLATION OF PETITIONER'S FREEDOM OF EXPRESSION

In part II of his argument, Petitioner cites *Carey v. Brown*, 447 U.S. 455 (1980); *United States v. O'Brien*, 391 U.S. 367 (1968) and *Widmar v. Vincent*, supra, for the proposition that regulation of speech on the basis of content is subject to exacting scrutiny and will be permitted only upon a showing that it serves a compelling state interest and is narrowly drawn to achieve that end. (Pet. 13.) Respondents do not deny that Petitioner's proposition is accurate with regard to access to a public forum, but Respondents deny that motor vehicle license plates constitute a public forum for purposes of the First Amendment, for the reasons stated in part II of this Argument. Nevertheless, Respondents submit that the policy established by DMV to preclude the use of words referring to deities and religions is constitutional even under the strict scrutiny standard required for a public forum.

As stated in Part II of this Argument, even Petitioner has admitted that the state has an interest in controlling the contents of its license plates. The plates are identified with the

state. They have the name of the state on them. In fact, the name of the state and the six characters are the only things on the plates other than stickers indicating an expiration date. There is no getting around the fact that individuals who read the message on a "Communiplete" will also see the name of the state, and that the state and the message will be associated visually. Respondents submit, and Petitioner has admitted (Tr. 32-37) that there will be an association between the state and the message in the mind of the reader, an association which may well be read as an implicit endorsement of the message by the state. Accordingly, Petitioner, through his counsel, has admitted that the state has an interest in controlling some messages, including those that are "totally gross," although he admits that he does not know where to draw the line. (Tr.37.)

Respondents submit that the Commonwealth has a compelling interest in controlling lewd, vulgar and otherwise offensive words on its license plates. It submits also that it has a compelling state interest in not permitting references to deities and religions on its license plates, because such references could be construed as implicit endorsement of such religions by the state, in violation of the Establishment Clause.

This Court has held that the interest of a governmental entity in complying with its constitutional obligations with regard to the Establishment Clause of the First Amendment may be characterized as a compelling state interest. *Widmar v. Vincent*, supra, 454 U.S. at 271. It is precisely that interest which Respondents submit makes its actions with regard to Petitioner's license plates not only appropriate but necessary. The DMV policy with regard to deities and religions assures that it cannot be seen as endorsing those deities and religions, and, accordingly, helps satisfy its Constitutional obligation.

Furthermore, as this Court has held, a state may not constitutionally "aid all religions as against non-believers" or "aid those religions based on a belief in the existence of God

as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Respondents submit that it follows from that rule that a state also cannot constitutionally aid nonbelievers as against religious believers. Accordingly, because Virginia does not allow references to deities or religions on its license plates, it must also disallow references to atheism.

Petitioner has contended that any such "religious neutrality" problem should be resolved, not by forbidding all religious references, but by adopting an open forum or equal access policy. (Pet. 15.) It is true that in the *Widmar* case this Court held that the government entity involved had violated the First Amendment rights of its students by forbidding the use of meeting rooms by religious groups rather than adopting an open forum approach which would have satisfied the state's obligation of neutrality under the Establishment Clause without interfering with the individuals' rights to exercise their religious freedom. Respondents submit, however that an open forum policy would not be workable in this case, because such an approach would lead to an entanglement of the state with religion.

The *Widmar* case makes use of a three pronged test described in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) to determine whether an open forum approach would be appropriate under the Establishment Clause. The third prong in that test is that it "must not foster 'an excessive government entanglement with religion.' " 454 U.S. at 271. Respondents submit that an open forum approach to personalized license plates containing religious references does not satisfy that prong of the test, at least so long as it is assumed that the state has a legitimate interest in excluding lewd, vulgar, or otherwise distasteful words from its license plates. An open forum approach likely would find DMV personnel in the position of determining whether applications for licenses such as "FUK GOD," "I AM GOD," "GOD SUX," "DOG GOD," and the like are

statements of religious beliefs which must be allowed under the First Amendment, or are merely vulgarities which can be forbidden. Respondents submit that such decision making is precisely what the policy adopted by DMV avoids, and that such decision making should be avoided because it entangles the state in religious matters.

Respondents submit that the only way to avoid such entanglements with religion is the method DMV has chosen: to disallow references to deities and religions on license plates, and to enforce that policy equally as to believers and nonbelievers.

IV

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

In section III of his argument, Petitioner alleges that "DMV has failed to articulate any standards by which license plate applications are evaluated." He also alleges that it is "admitted by the Respondents, that the complaint of one individual will result in revocation of a personalized license plate which has already been issued." (Pet. 18.)

Respondents have admitted that there are no published regulations pertaining to personalized license plates, but Respondents deny that that means that no standards exist. Respondents have submitted, and the trial court found, that a policy was in place prohibiting the issuance of license plates referring to a deity or religion (Pet. App. A6.)

Moreover, Respondents strongly deny that they have ever admitted that the complaint of one individual will result in revocation of a personalized license plate. Commissioner Williams, in answer to a question posed by Petitioner's attorney, stated that "it only takes one complaint to come to my office before it gets *acted on*." (Pet. App. A30, emphasis added.) Respondents deny that

"acted on" means that the license will be revoked. "Acted on" means that the license plate will be reviewed in light of DMV's policies. Revocation would occur if, and only if, the plate violates those policies, not merely because a complaint was received. Respondents have admitted that it may take a complaint to bring an offending license plate to the attention of DMV so that a review of the plate in light of DMV's policies can be made. That does not mean, however, that a complaint is either necessary, or sufficient in and of itself, to cause revocation. Many complaints to DMV about offensive license plates have not resulted in revocation of the plates. (Tr. 6-8.) Accordingly, Respondents submit that Petitioner's reliance on the case of *Larkin v. Grendel's Den, Inc.* 459 U.S. 116 (1982) is misplaced. A citizen's complaint about a license plate does not cause revocation of the plate and therefore is not a veto over the expression on that plate. A citizen's complaint serves merely as a notice to DMV that a review of the plate should be made.

Petitioner cites *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and *Cox v. Louisiana*, 379 U.S. 536 (1065) for the proposition that "[d]ue process requires that any statute or regulation having the effect of curtailing free expression contain reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement." (Pet. 20.) Respondents submit that all three of the cases cited deal with the "void-for-vagueness" doctrine which has been developed as a tool for addressing the requirements of due process cases involving criminal statutes.

The void-for-vagueness doctrine is grounded on the requirement that a criminal statute must provide fair warning to the public of what is proscribed. So far as Respondents have been able to ascertain, the void-for-vagueness doctrine has been applied only to criminal cases, and Respondents submit that there is no reason why it should be extended to reach a case such as this one. Neither the Petitioner nor anyone else is in danger of being

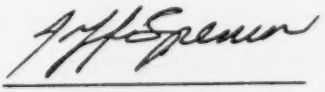
prosecuted on the basis of the contents of his "Communiplate." There is no requirement that anyone be forewarned of what is proscribed on "Communiplates" where the only "penalty" is that he will not be able to obtain what he would like.

Moreover, to the extent that DMV's policy prohibits the display of deities and religions on reserved license plates, regardless of the message which might be intended by the license applicant, it is clear to DMV personnel what is to be prohibited by such policy so that the risk of arbitrary or discriminatory application of the policy by such personnel is greatly reduced. It is not the message that the policy prohibits, it is the use of the words which refer to deities or religions (or non-religions). Accordingly, the policy forbids "LUV GOD" as well as "GOD SUX," and DMV personnel know it.

CONCLUSION

For the reasons stated herein, Respondents submit that this Court ought to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,



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